143 (2)

No. 09-98

SUPREME COURT, U.S.
FILED
OCT 23 2009
OFFICE OF THE CLERK

In the Supreme Court of the United States

WILMER LEE SCURLARK, AKA BONAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
RICHARD A. FRIEDMAN
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether a district court, pursuant to 18 U.S.C. 3582(c)(2), may reduce a sentence based on a binding agreement between the government and the defendant under Fed. R. Crim. P. 11(c)(1)(C) that a specific sentence or range constitutes the appropriate disposition, when the Sentencing Commission has subsequently reduced the Guidelines range specified in the agreement.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Gall v. *United States*, 128 S. Ct. 586 (2007)	7, 8
United States v. *Brown*, 71 Fed. Appx. 383 (5th Cir. 2003)	8
United States v. *Cieslowski*, 410 F.3d 353 (7th Cir. 2005), cert. denied, 546 U.S. 1097 (2006)	6
United States v. *Dews*, 551 F.3d 204 (4th Cir. 2008), vacated on grant of reh'g en banc, No. 08-6458 (4th Cir. Feb. 20, 2009), dismissed as moot (4th Cir. May 4, 2009)	8
United States v. *Hemminger*, No. 96-2081, 1997 WL 235838 (7th Cir. May 2, 1997)	8, 10
United States v. *Main*, 579 F.3d 200 (2d Cir. 2009)	8
United States v. *McKenna*, No. 97-30173, 1998 WL 30793 (9th Cir. Jan. 6, 1998)	8
United States v. *Pacheco-Navarette*, 432 F.3d 967 (9th Cir. 2005), cert. denied, 549 U.S. 892 (2006)	6
United States v. *Peveler*, 359 F.3d 369 (6th Cir.), cert. denied, 542 U.S. 911 (2004)	8, 10, 11

Cases—Continued: Page

United States v. *Sanchez*, 562 F.3d 275 (3d Cir. 2009), petition for cert. pending, No. 09-6659 (filed Sept. 23, 2009) 8, 9, 10

United States v. *Trujeque*, 100 F.3d 869 (10th Cir. 1996) 8, 10

Statutes, guidelines and rule:

18 U.S.C. 3146(a)(1) 2

18 U.S.C. 3582(c) 5, 7, 8, 10

18 U.S.C. 3582(c)(2) ..... *passim*

21 U.S.C. 841(a)(1) 2

21 U.S.C. 841(b)(1) 2

21 U.S.C. 841(b)(1)(C) 2

United States Sentencing Guidelines:

§ 1B1.10 7

§ 1B1.10(c) 3

§ 6B1.2(c) 6

App. C, Amend. 706 3

Fed. R. Crim. P.:

Rule 11(c)(1)(C) ..... *passim*

Rule 11(c)(3)(A) 6

Rule 11(e)(4) 5

Rule 11(e)(1)(C) (2001) 2, 9, 10

In the Supreme Court of the United States

No. 09-98

WILMER LEE SCURLARK, AKA BONAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 560 F.3d 839. The order of the district court (Pet. App. 8a-10a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 2009. On June 11, 2009, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including July 24, 2009, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a guilty plea in the United States District Court for the District of Minnesota, petitioner was convicted of possession of crack cocaine with intent to dis-

tribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). The district court sentenced him, pursuant to a sentencing agreement under Fed. R. Crim. P. 11(c)(1)(C), to 100 months of imprisonment. The district court denied petitioner's subsequent motion to reduce the sentence pursuant to 18 U.S.C. 3582(c)(2). The court of appeals affirmed. Pet. App. 1a-7a.

1. In 1994, petitioner was arrested and charged with possession with intent to distribute 218 grams of crack cocaine. He absconded and was a fugitive until 2006. Pet. App. 6a. In 2006, after petitioner was apprehended, he was charged by superseding indictment with attempted distribution of crack cocaine (21 U.S.C. 841(a)(1)), possession with intent to distribute crack cocaine (*ibid.*), and failure to appear (18 U.S.C. 3146(a)(1)). Pet. App. 1a.

Petitioner and the government entered into a plea agreement. Petitioner agreed to plead guilty to possession with intent to distribute crack cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). In exchange, the government agreed to dismiss the other counts of the indictment, forgo seeking sentencing enhancements, and recommend a 40% downward variance. Pet. App. 1a-2a. The parties also agreed that the ten-year mandatory minimum sentence prescribed by 21 U.S.C. 841(b)(1) would not apply. Pet. App. 12a. Pursuant to Fed. R. Crim. P. 11(c)(1)(C),[1] the parties agreed to a sentencing

---

[1] Rule 11(c)(1)(C) (slightly modified from former Rule 11(e)(1)(C) (2001)) permits the government in a plea agreement to "agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement)." Fed. R. Crim. P. 11(c)(1)(C).

range (before application of the downward variance) of 151 to 188 months of imprisonment, agreeing that petitioner's offense level (after adjustments) was 33 and that he had a Category II criminal history. Pet. App. 2a.

The district court accepted petitioner's guilty plea and the plea agreement. The court then applied the government's recommended 40% downward variance to the agreed-upon sentencing range, which yielded a sentencing range of 91 to 113 months of imprisonment. The court sentenced petitioner within that range to 100 months of imprisonment. Pet. App. 2a.

2. a. In 2008, petitioner moved for a sentence reduction pursuant to 18 U.S.C. 3582(c)(2). That statute provides that a district court

> may not modify a term of imprisonment once it has been imposed except that * * * (2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission * * * the court may reduce the term of imprisonment, after considering the factors set forth in [18 U.S.C.] 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

18 U.S.C. 3582(c)(2). Petitioner argued that he was entitled to the benefit of the crack-cocaine amendments to the Sentencing Guidelines, which retroactively reduced the base offense level for crack-cocaine offenses by two levels. See Pet. App. 2a; Sentencing Guidelines App. C, Amend. 706, § 1B1.10(c).

The district court denied petitioner's motion. The court ruled that it lacked authority to make a sentencing

reduction under Section 3582(c)(2) because petitioner had been sentenced pursuant to a binding Rule 11(c)(1)(C) plea agreement. Pet. App. 8a-10a.

b. The court of appeals affirmed. Pet. App. 1a-7a.

The court explained that the parties had stipulated to a sentencing range in their plea agreement and had agreed to be bound by the terms of Rule 11(c)(1)(C). Once the district court accepted that agreement, the court of appeals reasoned, Rule 11(c)(1)(C) required the court to sentence petitioner pursuant to the terms of the parties' agreement, and "§ 3582(c)(2) became inapplicable because [petitioner's] sentence was based on the agreement and not 'a sentencing range that ha[d] subsequently been lowered by the Sentencing Commission.'" Pet. App. 5a (quoting 18 U.S.C. 3582(c)(2)).

The court of appeals further noted that the "circumstances surrounding this Rule 11(c)(1)(C) plea agreement demonstrate the contractual nature of the agreement and the fact that the sentence was not based on a sentencing range that was subsequently lowered." Pet. App. 6a. The court pointed to the various ways in which the parties arranged to reach a lower sentencing range than otherwise would have applied under the Guidelines, including dismissal of the count that carried a mandatory ten-year minimum sentence, the 40% downward variance, the acceptance of responsibility credit (despite an obstruction-of-justice enhancement), and other favorable Guidelines computations. *Ibid.*

The court of appeals also rejected petitioner's argument that his sentence must have been based on the Guidelines on the ground that the plea agreement specified a sentencing range rather than a particular sentence, because "Rule 11(c)(1)(C) itself provides that parties may agree to 'a specific sentence *or* sentencing

range' and states that courts are bound by those agreements regardless." Pet. App. 6a (quoting Fed. R. Crim. P. 11(c)(1)(C)).

ARGUMENT

Petitioner contends (Pet. 10-25) that the court of appeals erred in holding that 18 U.S.C. 3582(c)(2) did not permit the district court in this case to reduce a sentence imposed pursuant to a Rule 11(c)(1)(C) plea agreement. The decision below is correct, and does not conflict with any decision of this Court or another court of appeals. Further review is therefore unwarranted.

1. The court of appeals correctly determined that 18 U.S.C. 3582(c)(2) does not apply when a defendant has been sentenced pursuant to a plea agreement under Fed. R. Crim. P. 11(c)(1)(C). Section 3582(c) sets forth the basic rule that a district "court may not modify a term of imprisonment once it has been imposed" and then specifies limited exceptions, including "in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission * * * if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. 3582(c)(2).

Under Rule 11(c)(1)(C), a defendant and the government may agree in a plea agreement "that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply." The provision further provides that "such a recommendation or request binds the court once the court accepts the plea agreement." Fed. R. Crim. P. 11(c)(1)(C). Rule 11(c)(4) provides that, "[i]f the court accepts the plea agreement * * *

the agreed disposition will be included in the judgment." Fed. R. Crim. P. 11(c)(4). The district court thus has no authority to modify the sentencing agreement of the parties once it accepts the plea agreement. See Fed. R. Crim. P. 11(c)(1)(C), (c)(3)(A), and (c)(4); see, *e.g.*, *United States* v. *Pacheco-Navarette*, 432 F.3d 967, 971 (9th Cir. 2005) ("[T]he district court is not permitted to deviate from * * * sentences stipulated in [Rule 11(c)(1)(C)] agreements."), cert. denied, 549 U.S. 892 (2006).

Accordingly, in the Rule 11(c)(1)(C) context, the district court imposes a sentence "based on" the agreement of the parties, regardless whether that sentence correlates to the Sentencing Guidelines range. Although the court might consider the applicable Guidelines range in determining whether to accept the plea agreement, see Sentencing Guidelines § 6B1.2(c), that does not mean that the defendant is sentenced "based on" the Guidelines range. See, *e.g.*, *United States* v. *Cieslowski*, 410 F.3d 353, 364 (7th Cir. 2005) ("A sentence imposed under a Rule 11(c)(1)(C) plea arises directly from the agreement itself, not from the Guidelines, even though the court can and should consult the Guidelines in deciding whether to accept the plea."), cert. denied, 546 U.S. 1097 (2006). The court may choose to accept a sentence or range specified by the parties' agreement and thereby become bound under the terms of the agreement and Rule 11(c)(1)(C), even if the sentence or range diverges from the Guidelines range. Even where the parties refer to a Guidelines range, as in this case (Pet. App. 6a), they often will negotiate factors relevant to determining that range in order to effectuate a particular sentence length. The parties' agreement as to that sentence or range, once accepted, becomes the control-

ling basis for the court's sentencing decision. The court of appeals therefore was correct to determine that the condition precedent to a Section 3582(c)(2) adjustment—that the sentence be "based on" a Guidelines range (18 U.S.C. 3582(c)(2))—was not satisfied in this case, where the sentence was imposed pursuant to a Rule 11(c)(1)(C) plea agreement.

That conclusion is supported by the purpose of Section 3582(c)(2) and Guidelines § 1B1.10 (the pertinent policy statement). Under those provisions, a court is given discretion to lower a sentence to take into account that a range used in formulating the original sentence was reduced. But the exercise of that discretion would be inconsistent with the effect of Rule 11(c)(1)(C), which eliminates the court's sentencing discretion (except to the extent expressly conferred by the parties) once it accepts a plea agreement. The government will often give up the right to seek a higher sentence in exchange for the certainty of obtaining a specific sentence. The contractual bargain, which became binding on the court after acceptance of the Rule 11(c)(1)(C) agreement, would be negated if Section 3582(c) were interpreted to grant the court discretion to lower the agreed-upon sentence in light of developments not reflected in the parties' agreement.

2. Petitioner argues (Pet. 15-16) that the decision of the court of appeals conflicts with *Gall* v. *United States*, 128 S. Ct. 586 (2007). Specifically, petitioner contends that, "[u]nder *Gall*, *all* sentences must be 'based on' the Guidelines." Pet. 16. That contention lacks merit. In *Gall*, this Court held generally that, "while the extent of the difference between a particular sentence and the recommended Guidelines range is surely relevant, courts of appeals must review all sentences—whether

inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard." 128 S. Ct. at 591. *Gall* did not involve a Rule 11(c)(1)(C) plea agreement (see 128 S. Ct. at 592-593) or 18 U.S.C. 3582(c). Accordingly, the Court had no occasion to address (even tangentially) the issue in this case.

3. Petitioner alleges (Pet. 11-15) a conflict among the courts of appeals on the question presented. There is no conflict.

All the courts of appeals to have considered the issue have agreed that Section 3582(c)(2) does not permit a district court to reduce a sentence imposed pursuant to a Rule 11(c)(1)(C) plea agreement. See *United States* v. *Main*, 579 F.3d 200, 203-204 (2d. Cir. 2009); *United States* v. *Sanchez*, 562 F.3d 275, 279-282 (3d Cir. 2009), petition for cert. pending, No. 09-6659 (filed Sept. 23, 2009); *United States* v. *Peveler*, 359 F.3d 369, 378-379 (6th Cir.), cert. denied, 542 U.S. 911 (2004); *United States* v. *Brown*, 71 Fed. Appx. 383, 384 (5th Cir. 2003) (unpublished); *United States* v. *McKenna*, No. 97-30173, 1998 WL 30793, at *1 (9th Cir. Jan. 16, 1998) (unpublished); *United States* v. *Hemminger*, No. 96-2081, 1997 WL 235838, at *1 (7th Cir. May 2, 1997) (unpublished); *United States* v. *Trujeque*, 100 F.3d 869, 870-871 (10th Cir. 1996).[2]

Petitioner erroneously asserts (Pet. 12-14) that the decision in this case conflicts with the Third Circuit's decision in *Sanchez*, *supra*. In *Sanchez*, the defendant

---

[2] A panel of the Fourth Circuit had reached a different conclusion, but the panel opinion was vacated when the Fourth Circuit granted rehearing en banc, and the case subsequently was dismissed for mootness. *United States* v. *Dews*, 551 F.3d 204 (4th Cir. 2008), vacated on grant of reh'g en banc, No. 08-6458 (4th Cir. Feb. 20, 2009), dismissed as moot (4th Cir. May 4, 2009).

was sentenced to 120 months of imprisonment for conspiracy to distribute crack cocaine pursuant to a Rule 11(e)(1)(C) (now Rule 11(c)(1)(C)) plea agreement. 562 F.3d at 277. (The Presentencing Report (PSR) had calculated a Guidelines range of 121 to 151 months of imprisonment. *Ibid.*) Notwithstanding a subsequent two-level reduction in offense level in light of the same Guidelines amendment at issue in this case, the court of appeals affirmed the district court's denial of a motion to reduce the sentence. The court of appeals reasoned that the defendant's "sentence was the result of a binding plea agreement and is therefore not subject to reduction under 18 U.S.C. § 3582(c)(2). * * * If 'binding' is to have meaning, it cannot be undone by the discretionary possibility of a different sentence under § 3582(c)(2)." *Sanchez*, 562 F.3d at 279, 282. That holding is completely consistent with the decision of the court of appeals in the instant case.

Petitioner argues that the Third Circuit in *Sanchez* adopted "a case-by-case approach" such that a district court's authority under Section 3582(c)(2) turns on whether it "considered the Guidelines in accepting the plea." Pet. 12-13 (citing *Sanchez*, 562 F.3d at 282 & n.8). But, as the text of the decision makes clear, the Third Circuit's approach is decidedly categorical when a Rule 11(c)(1)(C) plea is involved:

> While it is true that all plea agreements are binding on the parties, only those entered pursuant to what is now Rule 11(c)(1)(C) are binding on the sentencing court. That distinction is significant in the § 3582(c) context, which obliges us to ask what the sentence is 'based on.' Where, as here, the District Court accepted a so-called "C" plea, the answer is simple: the sentence is based on the terms expressly agreed on

> by the defendant and the government. That is what the Rule itself demands.

Sanchez, 562 F.3d at 282 n.8. In any event, petitioner does not and cannot dispute that *Sanchez*, like the decision below and every other court of appeals' decision to have addressed the issue, denied a sentence reduction under Section 3582(c).

Petitioner also erroneously asserts (Pet. 14-15) that the decision in this case conflicts with the Sixth Circuit's decision in *Peveler*, *supra*. In *Peveler*, the defendant and the government entered into a Rule 11(e)(1)(C) (now Rule 11(c)(1)(C)) agreement that specified the applicable offense level (like in this case) and required the government to recommend a sentence at the low end of the Guidelines range. 359 F.3d at 372-373. The district court accepted that agreement and sentenced the defendant accordingly. *Id.* at 373. Based on a subsequent amendment to the Guidelines that reduced the relevant range, the defendant invoked Section 3582(c)(2) and asked the district court to reduce the sentence. The court of appeals held that the district court lacked the authority to do so, agreeing with the reasoning of the Tenth Circuit in *Trujeque*, *supra*, and the Seventh Circuit in *Hemminger*, *supra*—substantially similar to the Eighth Circuit's reasoning below. *Peveler*, 359 F.3d at 377-379. Notably, the Sixth Circuit added that "[t]he fact that the parties in this case specified an offense level under the sentencing guidelines rather than a fixed period of imprisonment * * * is a distinction without a difference in terms of the court lacking power to amend the plea agreement." *Id.* at 378.

Petitioner nevertheless relies (Pet. 14) on a summary sentence in *Peveler* in which the Sixth Circuit stated that "absent an agreement of the parties, the plain lan-

guage of * * * Rule 11(c)(1)(C), generally precludes the district court from altering the parties' agreed sentence under 18 U.S.C. § 3582([c])." 359 F.3d at 379. The court did not indicate what kind of "agreement of the parties" might circumvent the binding nature of a Rule 11(c)(1)(C) sentence or provide any other elaboration. In any event, no such agreement existed in *Peveler* nor exists in this case, and petitioner does not suggest otherwise. Accordingly, that dictum is not implicated here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
LANNY A. BREUER
Assistant Attorney General
RICHARD A. FRIEDMAN
Attorney

OCTOBER 2009